IN THE

Supreme Court of the United States

October Term, 1978
No. 77-1553

COUNTY OF LOS ANGELES; BOARD OF SUPERVISORS OF THE COUNTY OF LOS ANGELES; and CIVIL SERVICE COMMISSION OF THE COUNTY OF LOS ANGELES,
Petitioners,

vs.

VAN DAVIS, HERSHEL CLADY and FRED VEGA, individually and on behalf of all others similarly situated, WILLIE C. BURSEY, ELIJAH HARRIS, JAMES W. SMITH, WILLIAM CLADY, STEPHEN HAYNES, JIMMIE ROY TUCKER, LEON AUBRY, RONALD CRAWFORD, JAMES HEARD, ALFRED R. BALTAZAR, OSBALDO A. AMPARAH, individually and on behalf of all others similarly situated,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR COUNTY OF LOS ANGELES, et al., PETITIONERS.

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Opinion and Judgment Below.

The opinion on rehearing (including dissent) of the United States Circuit Court of Appeals for the Ninth Circuit is reported as *Van Davis, et al. v. County of Los Angeles, et al.*, 566 F.2d 1334 (9th Cir. 1977). The original opinion of the circuit court is printed as Appendix F and reported as 13 FEP Cases 1217 (1976).

Jurisdiction.

The opinion and judgment were entered on December 14, 1977. A timely petition for rehearing was filed by the respondents, *Van Davis, et al.* (plaintiffs-appellants below), and was denied on January 30, 1978.

Jurisdiction of the district court was based on 28 U.S.C. Sec. 1343.

This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1), and Rule 19(1)(b), and the Petition for Writ of Certiorari was granted on June 19, 1978.

Constitutional and Statutory Provisions Involved.

1. The 5th and 14th Amendments to the United States Constitution; in particular, the due process and equal protection clauses thereof;

2. The following provisions of the United States Code:

42 U.S.C. Sec. 1981. Equal rights under the law:

> All persons within the jurisdiction of the United states shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and extractions of every kind, and to no other.

42 U.S.C. Sec. 2000e, *et seq.* Title VII of the Civil Rights Act of 1964 as amended in 1972.

Questions Presented.

1. Is proof of purposeful racial discriminatory intent required to establish a cause of action for employment

discrimination under 42 U.S.C. Sec. 1981 or can an employer be held liable for pre-Title VII employment practices under Sec. 1981 merely by a showing of disproportionate impact?

2. Is the imposition of a racial quota hiring order effective until the entire fire department achieves current racial parity with the general Los Angeles County population beyond the jurisdiction of the court when:

a. The district court expressly found no discriminatory intent was present;

b. The quota hiring order attempts to remedy hiring practices occurring prior to the effective date of Title VII and time barred by the applicable 3-year Statute of Limitations on Sec. 1981 actions;

c. The respondents had no standing to represent any pre-March 24, 1972 applicants and no discriminatory hiring has occurred subsequent to Title VII's effective date;

d. The quota remedy exceeds the scope of the effects of any proven discriminatory hiring practices?

Statement of the Case.

In this proceeding, the County of Los Angeles by judgment entered on July 20, 1973 was found liable for employment discrimination under 42 U.S.C. Sec. 1981 and Title VII and ordered to engage in quota hiring of blacks and Mexican-Americans until the entire fire department numbering 1750 firefighters achieved racial parity with the County's general population. The following pivotal facts were established at trial:

1. It was conceded by respondents that no discriminatory hiring occurred after the effective date of Title VII (A. 5, 6).

2. The trial court found that the County had not, at any time, engaged in purposeful discrimination. To the contrary, the court expressly found that the County had engaged in efforts designed to increase minority representation in the fire department (A. 41).

3. None of the respondents except those already employed by the department had been applicants for any firefighter position prior to 1972. None of the named plaintiffs had been disqualified or adversely affected in the selection process by any of petitioners' written tests. The Ninth Circuit subsequently held that the plaintiffs lacked standing to challenge the County's use of qualification tests given at any time prior to 1972 (A. 83).

4. All respondent applicants taking the 1972 written exam passed, and all hiring from the resulting eligibility list was conceded by plaintiffs prior to trial to have been accomplished in a non-discriminatory manner.

The respondents in their complaint filed on January 11, 1973 challenged two written employment tests of the County of Los Angeles—one given in 1969 and the other in 1972. Only these two written employment tests administered by the County of Los Angeles are relevant or were in issue in this case. Both tests were civil service aptitude tests developed by Los Angeles County's Department of Personnel and administered to all applicants for entry level firemen during the two periods when applications for employment were being accepted.[1] While also claiming the 5′7″ minimum

[1]The appointment procedure also included a competitive oral interview, medical exam, physical strength and agility test and background check. None of these tests had a disproportionate impact on minorities and were not challenged as being discriminatory by the respondents.

height standard was discriminatory, the plaintiffs (respondents herein) expressly declined to seek an injunction against its use in both the District and Circuit Court. None of the plaintiffs was disqualified by the minimum height standard. In an amended complaint the plaintiffs conceded that the hiring as a result of the 1972 test was not discriminatory (A. 5, 6). Ultimately, the Ninth Circuit in the decision under review ruled that the plaintiffs had no standing to challenge the 1969 written tests.

Legal Proceedings.

In July, 1973, the trial court found that petitioner County of Los Angeles had violated 42 U.S.C. Secs. 1981, 1983, and Sec. 2000e-16 (Title VII) by administering a written employment qualification test for entry-level firefighter in 1969, and January, 1972, which had "a disproportionate impact on blacks and Mexican-Americans and not shown by a validation study to be predictive of job performance statistically" (A. 39).[2] The district court upheld the department's 5′7″ minimum height standard. The court further found that neither the defendants nor their officials had engaged in any employment practices with a wilful or conscious purpose of excluding blacks and Mexican-Americans

[2]The only employment practices found by the district court to be discriminatory were, 1) the use of the two written tests having a disproportionate impact on blacks and Mexican-Americans and not shown by a validation study to be predictive of job performance statistically, and 2) the failure to cure a bad reputation in the minority community. The latter ground the circuit court did not consider sufficient to constitute a valid Title VII claim because it was extremely impressionistic and the district court did not rely on that theory. The only practices held by the circuit court as being discriminatory were the 1972 written test and the height requirement.

Davis v. County of Los Angeles, 13 FEP Cases 1217 at 1219 n.6.

from employment, but to the contrary, had engaged in efforts designed to increase minority representation in the Fire Department (A. 41). The district court also found that the petitioners did not interfere with affirmative action efforts of individual persons designed to increase black and Mexican-American participation rates in the Fire Department (A. 39).

As a remedy, the court ordered that the County hire all future entry level firemen in accordance with a hiring quota of 20% black and 20% Mexican-American until such time as the percentage representation of those minorities in the entire Fire Department in all ranks equaled their representation in the County's general population.

The only named plaintiffs in this case were individuals who were already employed as firefighters or who had applied for and taken only the 1972 written examination and were subsequently certified on a hiring list conceded by plaintiffs to have been administered and utilized in a non-discriminatory manner. No individual who had been unsuccessful on the 1969, or any prior exam, was a plaintiff, nor did the plaintiffs seek to represent such prior applicants, the complaint alleging that it was filed only on behalf of "blacks or Mexican-Americans" who are current or future applicants for employment as Los Angeles County Firemen (A. 3).

On appeal, the United States Court of Appeals for the Ninth Circuit, in its original decision, affirmed the judgment finding the County in violation of Sec. 1981. The court found that the plaintiffs failed to prove that specific discriminatory acts occurred during the effective period covered by Title VII because the tests administered in 1972 had not been implemented;

that is, no civil service list was promulgated or hires made as a consequence of the test results (A. 56, 57). Nevertheless, the court ruled that Title VII standards were applicable to Sec. 1981 claims and that a violation of Sec. 1981 could be established merely by showing that a hiring practice had a disparate effect on minorities and the employer was unable to validate the test as job-related. The circuit court reversed the trial court's judgment upholding petitioners' 5'7" minimum height standard and remanded for reconsideration of the quota.

Subsequent to its original decision, the Ninth Circuit, upon petitioners' request, granted a rehearing to determine, in light of this Court's recent decision in *Washington v. Davis,* 426 U.S. 229 (1976), whether proof of purposeful discriminatory intent is required for a violation of Sec. 1981. On rehearing, the Ninth Circuit (Judge Wallace dissenting) affirmed its original finding that there was no operational distinction between liability based upon Title VII and Sec. 1981 and that the adverse impact standards evolving from Title VII cases were sufficient to establish liability under Sec. 1981. It was held that a showing of deliberate intent to discriminate was not a requirement under Sec. 1981 as it was under the United States Constitution, as determined by this Court in *Washington v. Davis* (A. 89, 90).[3] The Ninth Circuit, however,

[3]The majority opinion expressed their ruling in these terms: "In our view, there remains no operational distinction in this context between liability based upon Title VII and Sec. 1981. . . . "In summary, we believe the district court properly found defendants use of the 1972 written examination as a selection device to be a violation of Sec. 1981. Plaintiffs produced overwhelming statistical data to establish the test's disproportionate impact upon minority applicants, and the defendants were unable to validate the test in terms of job-relatedness" (A. 90, 91).

did rule that respondents lacked standing to represent prior unsuccessful applicants including those taking the 1969 test because the class did not include any prior unsuccessful applicants. *Van Davis, et al. v. County of Los Angeles, et al.*, 566 F.2d 1334 at 1338 (A. 83).

Judge Wallace dissented, being of the opinion that constitutional standards were applicable to proving discrimination under Sec. 1981 and noting that, even if it were otherwise, the quota hiring order was excessive as well as improper in view of the court's finding that respondents lacked standing to represent former applicants.

Hiring Practices.

The written civil service test challenged in this litigation was administered to applicants for entry-level firefighter positions twice, once in 1969 and again in January, 1972. The oral interview and physical agility portions of the examination process were not attacked because they had no disproportionate impact on minorities. Implementation of the 1972 administered test was delayed pending litigation in the state courts and when finally utilized for hiring purposes in 1973, was used only on a pass-fail basis with 97% of all applicants passing. As to these passing applicants, their subsequent oral interviews and physical examinations had no adverse impact.

The County of Los Angeles hired no firemen from well before March 24, 1972 (the effective date of Title VII) until the Spring of 1973, when the first recruit class was composed 50% of minorities (10

blacks and 20 Mexican-Americans.)[4] All subsequent hiring has been pursuant to the trial court's 40% preferential minority hiring order of July, 1973. At no time was there any claim made that there had been discriminatory hiring since March 24, 1972, or as a consequence of the 1972 written test.

It was established at trial in June, 1973 that the 1969 written exam as utilized in the hiring of new firefighters had a disproportionate impact on blacks and Mexican-Americans. The County, however, in the administration of the subsequent 1972 exam, set the cut off score extremely low so that 97% of the applicants passed, and then intended to process through the oral interview and physical agility phases of the selection process approximately 500 of those applicants. These 500 would be chosen totally by random selection so that the minority applicant percentage which approximated their community representation would be maintained throughout the subsequent stages of the selection process which had shown no history of disproportionate racial impact (A. 23, 24).

A state lawsuit alleging that the proposed random selection method violated the civil service law resulted in its use being enjoined. After a year's delay, the County, because of the urgent need for new firemen, initially contemplated interviewing the top 544 applicants on the 1972 written test. No such selection or interviews were ever commenced. Instead, all passing applicants were interviewed and hires were made in a non-discriminatory manner (A. 5, 6, 25).

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[4]The respondents, in their first and second amended complaints, alleged that the hiring of this recruit class was done in a non-discriminatory manner (A. 5, 6).

During the five-year pendency of the appeal, the petitioners observed, and in most cases exceeded the terms of the quota hiring order, and as of July, 1978, had hired as firemen recruits 373 persons of which 207 (55.5%) were blacks or Mexican-Americans. Pursuant to the terms of the judgment the district court receives annual reports and retains jurisdiction over the case until the entire department reaches community racial parity.

Summary of Argument.

The judgment herein holding the petitioner liable for pre-Title VII (March 24, 1972) employment practices is challenged on two primary grounds:

1) Purposeful discriminatory intent is required to establish a violation of 42 U.S.C. Sec. 1981. This the respondents failed to do as the trial court expressly found no intentional discrimination in regard to any of petitioners' employment practices.

2) The quota hiring order was beyond the District Court's jurisdiction as it clearly exceeds the scope of the violations and illegally strives to achieve racial balance rather than remedy the effects of proven discrimination occurring within the actionable 3-year Statute of Limitations period. Moreover, the respondents (none of whom had been discriminatorily denied employment) lacked standing to represent prior applicants who were objects of the remedial order.

The petitioners made no hires in a discriminatory manner or with any disproportionate effect subsequent to the effective date of Title VII, nor in any way engaged in a pattern or practice of discrimination.

42 U.S.C. Sec. 1981, enacted originally as part of the Civil Rights Act of 1866 and reenacted as part of the Civil Rights Act of 1870, is a statute separate and distinct from Title VII and is neither co-extensive in coverage or in the standards for measuring an actionable claim. Section 1981 is an equal protection statute similar to Sec. 1983, enacted to protect constitutional rights in accordance with the congressional intent to prohibit deliberate discrimination. The more stringent presumptions, standards, and burdens of proof unique to Title VII are not applicable to claims under Sec. 1981 as the Supreme Court has held them not to be applicable to the Fourteenth Amendment and Sec. 1983 in *Washington v. Davis,* 426 U.S. 229 (1976).

A decision that constitutional standards (purposeful intent) govern the proof of a cause of action under Sec. 1981 will comport with its legislative history, its application in related discrimination cases, and will harmonize that statute with parallel interpretations of Secs. 1982, 1983, 1985, and the U.S. Constitution. Moreover, such an interpretation is necessary to avoid the harm attendant to Title VII enforcement procedures if Sec. 1981 discrimination standards are held to be operationally the same as Title VII's.

Extending Title VII standards to Sec. 1981 causes of action will necessarily create conceptual confusion in all forms of non-employment discrimination actions under Sec. 1981. To a great extent the effect of the Court's ruling in *Washington v. Davis* will be negated by the simple expedient of alleging a cause of action under Sec. 1981. Moreover, the circuit court's decision will permit circumvention of the Title VII's administrative, conciliatory, and procedural prerequisites. The

latter consequence, because of differing statutes of limitation among the jurisdictions, would destroy the enforcement uniformity of Title VII and expose the federal courts to a flood of litigation on claims that Congress intended should be first winnowed through the EEOC conciliation machinery. The circuit court's decision effectively vitiates the clear distinction this Court has made between proof and liability for pre- and post-Title VII employment practices and makes Title VII retroactive to government agencies.

Although liability and the quota hiring order have been predicated upon a violation of Sec. 1981, it is likewise clear that there has been no violation of Title VII. All hires by the petitioners subsequent to the effective date of Title VII have been non-discriminatory, without disproportionate effect, and in compliance with the Court's quota hiring order. Under the facts of the case, there is absolutely no basis for a finding of Title VII violation and certainly there is no factual justification for the wide-ranging quota hiring order imposed.

Although the focus of the argument has been directed to the Sec. 1981 issue, the nature of the remedy imposed has far-reaching consequences and is subject to serious challenge. The trial court's hiring order requiring 40% minority hiring per annum until the entire fire department achieves racial parity with the general county population is in excess of the court's jurisdiction and violates Sec. 703(j) of Title VII. The respondents have concurred that the remedial hiring order herein was based upon a pattern and practice of discriminatory practices that were unlawful only under Sec. 1981, not Title VII (Opposition 29). As such, of course,

the quota order is totally unrelated to the extent of any proven violation, seeks to provide a remedy to a class the court of appeals has held the respondents have no standing to represent, and attempts to remedy speculative unproven discrimination that could have only taken place, if at all, more than three years preceding the filing of the action and thus time barred under the applicable statute of limitations.

ARGUMENT.

I

CONSTITUTIONAL, NOT TITLE VII, STANDARDS OF DISCRIMINATION GOVERN CLAIMS UNDER 42 U.S.C. SEC. 1981; PURPOSEFUL DISCRIMINATION IS THE CORRECT CRITERION FOR ADJUDGING A VIOLATION OF SEC. 1981.

A. Section 1981 Is a Separate and Distinct Equal Protection Statute Whose Standards of Liability Should Track Constitutional Principles, Not Those of Title VII.

The circuit court's holding that there remains no operational distinction between liability based upon Title VII and Sec. 1981 ignores Sec. 1981's constitutional heritage and embarks the federal courts on a journey that is completely divergent from the historical foundations of the Civil Rights Acts of 1866 and 1870.

One begins with the observation that Sec. 1981 and Title VII are separate, distinct and independent statutes affording different, albeit to some extent related, rights and remedies. The independent nature of the two statutes, enacted more than ninety years apart, was firmly established by the Court in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975).

In *Johnson*, the Court had occasion to decide whether the filing of an EEOC charge pursuant to Title VII tolled the statute of limitations applicable to an action on the same facts under Sec. 1981. The Court, in concluding that it did not and that the plaintiff was barred from pursuing his claim under Sec. 1981 stated that,

> "Sec. 1981 is not coextensive in its coverage with Title VII",

and commented further,

> ". . . that the remedies available under Title VII and Sec. 1981, although related and although directed to most of the same ends, are separate, distinct, and independent . . ."
>
> *Johnson v. Railway Express Agency, Inc., supra* at 460, 461.

In an earlier case, *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 88 S.Ct. 2186 (1968), the Supreme Court noted the independent nature of the Reconstruction Era Civil Rights Statutes and the recently enacted Civil Rights Act of 1968. Title VIII of the Civil Rights Act of 1968, similar to Title VII of the Civil Rights Act of 1964, prohibited discrimination in a defined area of congressional concern and provided comprehensive administrative machinery for the enforcement of open and non-discriminatory housing. The Supreme Court found that statute to be quite different from its 100-year-old predecessor in 42 U.S.C. Sec. 1982 stating,

> "Later the same day, the House passed the Civil Rights Act of 1968. Its enactment had no effect upon Sec. 1982 and no effect upon this litigation, but it underscored the vast differences between, on the one hand, a general statute applicable only to racial discrimination in the rental and sale of property and enforceable only by private parties acting on their own initiative, and, on the other hand, a detailed housing law, applicable to a broad range of discriminatory practices and

enforceable by a complete arsenal of federal authority."

Jones v. Alfred H. Mayer Co., supra at 2191.

Although *Jones* involved Sec. 1982, a companion to Sec. 1981 in the Civil Rights Act of 1870, the Court's analysis of that statute in the context of the recently enacted Title VIII of the Civil Rights Act of 1968 is extremely illuminating. In addition to recognizing the independent nature of the two statutes, the Court found that the passage of the modern law had *no* effect upon Sec. 1982—a view similar to the one urged by the petitioners herein—that Title VII of the 1964 Civil Rights Act was not intended to, and, in fact, did not have any effect on Sec. 1981.

Evidence in the *Congressional Record* could not make it more clear that Congress in enacting Title VII in 1964 and amending it in 1972, intended Title VII to provide an additional, independent cause of action and in no way to affect Secs. 1981, 1983:

> "In establishing the applicability of Title VII to state and local employees, the Committee wishes to emphasize that the individual's right to file a civil action in his own behalf, pursuant to the Civil Rights Act of 1870 and 1871, 42 U.S.C. Secs. 1981 and 1983, is in no way affected" . . . .
>
> "Title VII was envisioned as an independent statutory authority meant to provide an aggrieved individual with an additional remedy to redress employment discrimination . . . ."
>
> *U.S. Cong. & Adm. News* '72, p. 2154.

In debating whether to repeal Sec. 1981 and to make Title VII the exclusive discrimination remedy

in 1972, it was stated by Senator Williams in support of retaining Sec. 1981 that:

> "This is especially true where the legal issues under other laws may not fall within the scope of Title VII or where the employee, employer, or labor organization does not fall within the jurisdictional confines of Title VII. These situations do exist, and I am sure that it is unnecessary to spell them out at this point."
>
> 1972 Senate *Congressional Record,* p. 3372.

While both the Supreme Court and Congress have observed that Sec. 1981 and Title VII are separate and distinct statutes providing independent avenues for relief, it has been remarked that the remedies are, to a certain extent, coextensive and that the two statutes augment each other and are not mutually exclusive. This is correct, of course, to the same extent as can be said about any number of laws that deal in general with the same subject matter. This does not mean that the same standard of liability pertains to each statute and that purposeful intent is not a necessary element to a Sec. 1981 claim.

The remedies available under Sec. 1981 and Title VII are very similar and both statutes provide a cause of action for discrimination in employment, including that of a *deliberate* character. This overlap of remedies and jurisdiction in the instance of deliberate discrimination cannot be taken as a basis for concluding that the proof of discrimination is the same in all cases under the two independent statutes and that Sec. 1981 prohibits unintentional discrimination upon proof that a neutral hiring practice had a disproportionate impact.

Since Title VII and Sec. 1981 are clearly independent statutes, and the petitioners' liability was predicated

on the latter, the inquiry must focus on what is the standard of liability under Sec. 1981 as intended by Congress in the post-Civil War period.

1. Section 1981 Was Enacted as an Equal Protection Statute Intended to Enforce Constitutional Rights.

Section 1981 is a post-Civil War Reconstruction Era statute originally enacted in 1866 to enforce the 13th Amendment to the United States Constitution which prohibits involuntary servitude, and extends to others the same right to make and enforce contracts enjoyed by white citizens—that is, equal rights under the laws. Section 1981 was subsequently reenacted as part of the Civil Rights Act of 1870, which was designed to implement the 14th Amendment. Clearly, Sec. 1981, enacted as part of the Civil Rights Act of 1866, rested only on the 13th Amendment as the 14th Amendment had not been formally proposed at the time. The Civil Rights Act of 1870, however, is based upon the 14th Amendment and it reenacted, with minor changes, certain language of Sec. 1981, as it appeared in the 1866 Act.

In determining whether Sec. 1981 is based solely on the 13th or 14th Amendment, the problem is compounded by the reenactment of Secs. 1981 and 1983 together in the recodification in 1874. The most recent Supreme Court view appears to be that Sec. 1981 finds its roots in *both* the 13th and 14th Amendments.

While the true constitutional antecedents of Secs. 1981 and 1983 may make for an interesting excursion into the realm of legislative genealogy, its resolution is not determinative of the predominant issue of this case; *i.e.*, whether Title VII or constitutional standards of liability pertain. It is clear that Sec. 1981 is based

upon a constitutional right which the Court has found is traceable, in substantial part, to the 14th Amendment. Even assuming Sec. 1981 to be predicated solely on the 13th Amendment, the standard of liability is still purposeful racial discrimination.

The broader equal protection principles applicable to all races from Sec. 1981 has been recently emphasized by this Court despite its partial heritage from the 13th Amendment. *McDonnell v. Santa Fe Trail Transportation Co.*, 427 U.S. 327, 96 S.Ct. 2574 (1976); *Runyon v. McCrary*, 427 U.S. 160, 96 S.Ct. 2586 (1976). In this context, an argument that constitutional distinctions in the origins of Secs. 1983 and 1981, in and of themselves, require rejection of the *Washington v. Davis* rule when applied to local government action challenged under Sec. 1981, lacks persuasion. Standards for actionable discrimination under the two statutes should be harmonized, rather than distinguished, a concept noted by this Court in *Runyon v. McCrary, supra*. Section 1981 prohibits racial distinctions in the terms of, or in the right to make, a contract. It does not incorporate the subtleties and rigorous standards relating to adverse impact and test validation that have evolved with the passage of Title VII and its subsequent interpretation by the courts and administrative agencies. If the employer deliberately discriminates in making an employment contract based on race, or specifies different terms and conditions thereof based solely on race, then those statutes as well as the United States Constitution have been violated.

> "One of the 'rights enumerated' in Sec. 1 is 'the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens . . . .' 14 Stat. 27. Just as in *Jones* a Negro's Sec. 1 right to

purchase property on equal terms with whites was violated when a private person refused to sell to the prospective purchaser solely because he was a Negro, so also a Negro's Sec. 1 right to 'make and enforce contracts' is violated if a private offerer refuses to extend a Negro, solely because he is a Negro, the same opportunity to enter into contracts as he extends to white offerees."

Runyon v. McCrary, supra at 2594.

This exclusion based on race alone is clearly not what occurred in the instant case or in *Washington v. Davis*. In both instances, the same civil service developed test was administered to all races and the same grading and scoring standards for determination of eligibility for appointment were applied equally and consistently to all races. The respondents have predicated their entire case solely upon a showing of disproportionate impact and a claim that the defendants cannot prove by a validation study that their tests are related to, or predictive of, job performance statistically—evidentiary principles that have evolved *solely* from Title VII decisions.

The Supreme Court has previously held that discriminatory intent is required under 42 U.S.C. Secs. 1982, 1983 and 1985(3). Section 1981 should be construed accordingly. In *Tillman v. Wheaton-Haven Recreation Assn.*, 410 U.S. 431, 93 S.Ct. 1090 (1973), *supra*, the Court stated that Secs. 1981 and 1982 should be construed together in light of their historical relationship. Noting the independence of Title VIII from Sec. 1982, the Court in *Jones v. Alfred Mayer Co.*, went on to interpret Sec. 1982, itself, to determine if it prohibited private as well as public discrimination. The

present language of Sec. 1982 is remarkably similar in its broad scope to that of Sec. 1981 since both find their genesis in Sec. 1 of the 1866 Civil Rights Act. As the Court described the statute in *Jones, supra* at 2193,

". . . [i]n plain and unambiguous terms Sec. 1982 grants to all citizens, without regard to race or color, the same right to purchase or lease property as is enjoyed by white citizens."

The present language of Sec. 1981 was originally part of Sec. 1 of the 1866 Civil Rights Act which provided:

". . . citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, * * * shall have the same right, in every State and Territory in the United States, *to make and enforce contracts,* to sue, be parties, and give evidence, *to inherit, purchase, lease, sell, hold, and convey real and personal property,* and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding." (Emphasis added).

In later codifications, the language pertaining to the right to make and enforce contracts was retained in Sec. 1981, and the language relating to the right to purchase, lease and convey real or personal property was transposed to a new section enumerated as Sec. 1982. In interpreting what the present language of Sec. 1982 was intended to prohibit, the Court stated:

"Hence the structure of the 1866 Act, as well as its language, points to the conclusion urged

by the petitioners in this case—that Sec. 1 was meant to prohibit all racially *motivated* deprivations of the rights enumerated in the statute. . . ." (Emphasis added).

Jones v. Alfred H. Mayer Co., supra at 2196.

Two statutes enacted at the same time, sharing the same congressional goals and the same Civil Rights Act, and utilizing essentially the same language, particularly the operative phrases under which certain forms of discrimination are actionable; to wit, "to make and enforce contracts," and "to . . . purchase, lease, sell . . . and convey real and personal property" must be considered *in pari materia* and construed accordingly. The parity of construction between Secs. 1981 and 1982 is further supported by the Supreme Court's finding in *Tillman v. Wheaton-Haven Recreation Assn.*, 410 U.S. 431, 93 S.Ct. 1090 (a case involving an express racial exclusionary policy), that:

> "In light of the historical interrelationship between Sec. 1981 and Sec. 1982, there is no reason to construe these sections differently when applied on these facts to the claim of *Wheaton-Haven* that it is a private club."
>
> *Tillman v. Wheaton-Haven Recreation Assn., supra* at 172.

Additional support for the conclusion that Sec. 1981 is an equal protection constitutionally based statute requiring proof of discriminatory intent is provided by this Court's decision interpreting Sec. 1985(3), enacted as part of the 1871 Act, in *Griffin v. Breckenridge*, 403 U.S. 88, 91 S.Ct. 1790 (1971). In *Griffin*, the Court held that Sec. 1985(3) was premised on the 13th Amendment and that a required element of a

cause of action under that statute was invidious discriminatory intent:

> "The constitutional shoals that would be in the path of interpreting Sec. 1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose—by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment. See the remarks of Representatives Willard and Shellabarger, quoted *supra*, at 1797. The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all."

2. Congressional Intent in the Enactment of Section 1981 Was to Prohibit Unconstitutional, Purposeful Discrimination, Not to Create Liability Based on Disproportionate Impact.

The discrimination addressed by Congress at time of enactment of Sec. 1981 was intentional, not consequential. The adverse impact theory did not evolve until the EEOC Guidelines of 1970 and the interpretive *Griggs* decision of 1971. Although serious doubt exists as to whether Congress even intended adverse impact standards without considerations of intent to apply to Title VII, particularly in regard to public employers (see Seelman, *Employment Testing Law;* 10 Urban Lawyer 1, 49, 59, n 206); it is clear the *Griggs* doctrine evolved solely in conjunction with Title VII.

One cannot avoid noting the inequity of holding the County of Los Angeles liable for pre-1971 hiring practices under a standard that did not emerge until 1971. The disproportionate impact criterion is a creature of contemporary development, not mentioned by Congress in 1964, or expressly provided for in Title VII. In fact, prior to the issuance of the 1970 EEOC Guidelines, that agency had not adopted adverse impact as an indicium of prohibited racial discrimination.

It is difficult to envision how an agency without the power to issue regulations having the force and effect of law in regard to the statute which created it (*Gilbert v. General Electric*, 429 U.S. 125 (1976)), can change the standards of liability under a statute predating it by 100 years and with regard to which they have no regulatory relationship. Changes in a federal agency position on testing principles indicate the uncertain nature of employment discrimination concepts even in the context of Title VII. The civil service procedures developed in the late 19th and early 20th centuries to promote merit hiring in public employment, such as the Federal Service Entrance Examination at issue in *Washington v. Davis* and those developed nationally by state and local entities, were considered models of public administration. It is inconceivable that Congress in 1866 could have intended these to constitute a violation of Sec. 1981 absent racial motivation in their use. What constitutes a proper testing technique remains a matter of intense controversy (see

Brief of APA, Division 14, in *Washington v. Davis*). Whether an employer has violated an 1866 civil rights statute should not turn upon psychological testing standards in contemporary vogue.

B. Extension of Griggs Doctrine to Section 1981 Is Inconsistent With Established Standards of Liability in Non-employment Civil Rights Actions.

In addition to disagreeing with the application of the *Griggs* standard in previous employment discrimination cases under Secs. 1981 and 1983, this Court in *Washington v. Davis, supra* at 240, 2047, expressly ruled it inapplicable to constitutional discrimination claims in other contexts. The Court in *Washington* stated, *supra* at 2051,

> "A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white."

The concern noted above will become a reality if the contract clause in Sec. 1981 is interpreted and applied in conjunction with the *Griggs* doctrine. For example, the Court in *Jones v. Alfred H. Mayer Co., supra*, construed Sec. 1982 which prohibits discrimination in the sale and purchase of real property as being directed against racially motivated practices. However, the right to purchase or sell real property is

exercised contractually. If disproportionate impact is insufficient for liability under Sec. 1982, then a claimant in a non-employment context need simply plead his case under Sec. 1981 and thus invalidate the challenged property related practice simply on the ground it is more burdensome to minorities.

Racial discrimination claims not involving employment have been and will continue to be brought under Sec. 1981 as well as Sec. 1983 and the Constitution. There is nothing in the legislative history of Sec. 1981 which suggests that liability thereunder is to be premised merely upon a showing of disproportionate impact or that employment cases are to be accorded special treatment and be subject to different standards of proof than other civil rights claims encompassed by that statute. The Circuit Court's holding herein, necessarily undermines the thrust of the *Washington* decision and invites confusion and error as to the correct standard for proving discrimination in future nonemployment cases under Sec. 1981.

Sec. 1981, as noted earlier, broadly protects the right of all persons in the United States to make and enforce contracts and to have the full and equal benefit of all laws. Discrimination actions alleging a violation of that statute have been prosecuted against a wide variety of public and private actions in which the courts have uniformly applied the constitutional deliberate intent standard, a fact emphasized by this Court in Washington. Recent examples are:

> *Runyon v. McCrary, supra,* (denial of admission to publicly advertised private schools solely because of race); *Hills v. Gautreaux,* (1976) 425 U.S. 284 [96 S.Ct. 1538] (discriminatory housing

> practices that selected sites to intentionally avoid placing blacks in white neighborhoods); *Jennings v. Paterson,* (5th Cir. 1974) 488 F.2d 436 (construction of road barricade to deliberately bar access to blacks); *Olzman v. Lake Hills Swim Club, Inc.,* (2nd Cir. 1974) 495 F.2d 1333 (racially motivated swim club exclusory policy); *Bell v. Southwell,* (5th Cir. 1967) 376 F.2d 659 (segregated voting lists and booths).

In each case where liability was established it was predicated upon evidence of deliberate intent, not a neutral practice that in operation had a racially disproportionate impact. The suggestion that racial impact standing alone should now be the standard for liability appears rejected by the majority in *Washington* when the Court stated:

> "Both before and after *Palmer v. Thompson,* however, various Courts of Appeals have held in several contexts, *including public employment,* that the substantially disproportionate racial impact of a statute or official practice standing alone and without regard to discriminatory purpose, suffices to prove racial discrimination violating the Equal Protection Clause absent some justification going substantially beyond what would be necessary to validate most other legislative classifications. The cases impressively demonstrate that there is another side to the issue; but, with all due respect, *to the extent that those cases rested on or expressed the view that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation, we are in disagreement.*" (Emphasis added).
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> *Washington v. Davis, supra* at 246, 2050.

In footnote 12, *Washington v. Davis, supra* at 2050, the Court listed the numerous cases with which they disagreed including a substantial number dealing with public employment.[5] Many of these cases in both the employment and non-employment contexts were brought under Sec. 1981 as well as Sec. 1983. Notable examples are:

> *Chance v. Board of Examiners,* 458 F.2d 1167, 1176-1177 (CA2 1972); *Bridgeport Guardians v. Bridgeport Civil Service Comm'n.,* 482 F.2d 1333, 1337 (CA2 1973); *Castro v. Beecher,* 459 F.2d 725, 732-733 (CA1 1972); *Arnold*

[5]Cases dealing with public employment include *Chance v. Board of Examiners,* 458 F.2d 1167, 1176-1177 (CA2 1972); *Castro v. Beecher,* 459 F.2d 725, 732-733 (CA1 1972); *Bridgeport Guardian v. Bridgeport Civil Service Comm'n,* 482 F.2d 1333, 1337 (CA2 1973); *Harper v. Mayor of Baltimore,* 359 F.Supp. 1187, 1200 (D.Md.), aff'd in pertient part *sub nom.; Harper v. Kloster,* 486 F.2d 1134 (CA4 1973); *Douglas v. Hampton,* 168 U.S.App.D.C. 62, 67, 512 F.2d 976, 981 (1975); but cf. *Tyler v. Vickery,* 517 F.2d 1089, 1096-1097 (CA5 1975), cert. pending, No. 75-1026. There are also District Court cases: *Wade v. Mississippi Cooperative Extension Serv.,* 372 F.Supp. 126, 143 (ND Miss. 1974); *Arnold v. Ballard,* 390 F.Supp. 723, 736, 737 (N.D. Ohio 1975); *United States v. City of Chicago,* 385 F.Supp. 543, 553 (N.D. Ill. 1974); *Fowler v. Schwarzwalder,* 351 F.Supp. 721, 724 (D. Minn. 1972), rev'd on other grounds, 498 F.2d 143 (CA8 1974).

In other contexts there are *Norwalk CORE v. Norwalk Redevelopment Agency,* 395 F.2d 920 (CA2 1968) (urban renewal); *Kennedy Park Homes Assn. v. City of Lackawanna,* 436 F.2d 108, 114 (CA2 1970), cert. denied, 401 U.S. 1010, 91 S.Ct. 1256, 28 L.Ed.2d 546 (1971) (zoning); *Southern Alameda Spanish Speaking Organization v. Union City,* 424 F.2d 291 (CA9 1970) (dictum) (zoning); *Metropolitan H. D. Corp. v. Village of Arlington Heights,* 517 F.2d 409 (CA7), cert. granted, December 15, 1975, 423 U.S. 1030, 96 S.Ct. 560, 46 L.Ed.2d 404 (1975) (zoning); *Gautreaux v. Romney,* 448 F.2d 731, 738 (CA7 1971) (dictum) (public housing); *Crow v. Brown,* 332 F.Supp. 382, 391 (N.D. Ga. 1971), aff'd, 457 F.2d 788 (CA5 1972) (public housing); *Hawkins v. Town of Shaw,* 437 F.2d 1286 (CA5 1971), aff'd on rehearing en banc, 461 F.2d 1171 (1972) (municipal services).

> *v. Ballard,* 390 F.Supp. 723, 736, 737 (N.D. Ohio 1975).

Of particular interest is the fact that the district court in *Arnold v. Ballard* upon remand subsequent to *Washington v. Davis* held that discriminatory intent is required under §1981 and expressly disagreed with the majority opinion in the instant case. (U.S.D.C. N.D. Ohio, C73-478, March 14, 1978).

The respondents' Opposition to the Petition for Certiorari reveals that they do not contend that the *Griggs* standards should be transposed to nonemployment Sec. 1981 actions. Instead, they posit the theory that employment cases are a special class within Sec. 1981 to which a different standard for adjudicating illegal discrimination is applicable. There is, however, no justification in either the legislative history or judicial interpretations of that section for such an expansive broad contention. It is inconceivable that in 1866 the Members of Congress had in mind the *Griggs* doctrine, or that they possessed a unique concern for employment practices out of the many others that would affect the recently emancipated blacks. Applying *Griggs* standards only to employment cases under Sec. 1981 is a form of statutory surgery contrary to the will of Congress.

It is clear that Sec. 1981 does not speak separately as to employment practices, but refers to the making of *all* contracts and the full and equal benefit of *all* laws. Recognizing that Sec. 1981 on its face does not provide for different considerations in employment cases, the argument is advanced that Congress in enacting Title VII intended to modify Sec. 1981 *only as to employment discrimination claims,* and, thereby, borrow the *Griggs* standard.

This effort at statutory reconstruction, while novel, simply does not comport with the facts, the legislative history or any judicial interpretation. There is, indeed, a great deal of evidence that Congress in enacting Title VII did not intend to eliminate purposeful intent as an element of proof. Nevertheless, it is clear that Title VII did not affect previously enacted civil rights laws any more than Title VIII of the 1968 Civil Rights Act affected Sec. 1982, (see *Jones v. Alfred H. Mayer, supra*).

C. The Federal Civil Rights Acts of 1866, 1870, 1871 and the Constitution Should Be Harmonized by a Consistent Standard for Determining Illegal Discrimination.

The various statutes comprising the CRA of 1866 and 1871 should be construed consistently in regard to the standard of liability. As this and other related cases demonstrate, there is a need to harmonize Sec. 1981 with the liability standards under Secs. 1982, 1983 and 1985(3), as well as the United States Constitution. All of these statutes as well as the 13th and 14th Amendments were enacted during the same historical period in the form of equal protection legislation. Discriminatory intent is the established standard under the Constitution and in employment discrimination cases under Sec. 1983; likewise, it is a required element of proof under Sec. 1982 (*Jones v. Mayer*) and 1985 (3) (*Griffin v. Breckenridge*). The same principle pertains to Sec. 1981.

Neither legislative nor judicial precedent justifies a different treatment of Sec. 1981 in general, and certainly not in the limited area of employment. It is the Constitution and the Reconstruction Era Civil

Rights Acts that require harmonizing—not those statutes and Title VII.

Besides being off the point, any theory that suggests that Title VII and Sec. 1981 should be harmonized by transposing Title VII standards of liability suffers from ignorance of the legislative history, antecedents, and purpose of each statute, as well as this Court's determination that the statutes are distinct and independent. It is simply wrong to believe that the statutes can be truly "harmonized" at all in this fashion. Rather than harmonize, a holding that the standards of proof and liability under Sec. 1981 are operationally the same, inevitably does violence to the procedures, goals, rights and liabilities that Congress intended to establish through the enactment of Title VII.

The Supreme Court in *Washington v. Davis* observed the differences between the modern Title VII and the 14th Amendment. This distinction should continue to be maintained by determining that outside of Title VII, or some other statute that may specifically impose a *Griggs* standard, the uniform liability standard for employment discrimination is one of racial motivation and discriminatory intent.

II

THE DECISION IS CONTRARY TO THE SUPREME COURT'S RULINGS IN WASHINGTON V. DAVIS AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS V. UNITED STATES.

A. The Decision Unjustifiably Ignores the Purposeful Intent Holding in Washington v. Davis.

In *Washington v. Davis, supra,* this Court ruled that the standard for adjudicating claims of racial discrimination under Title VII was not the same standard

for adjudicating such claims under the Constitution. Although the complaint in *Washington* alleged a cause of action under Sec. 1981 as well as the Constitution, the Court did not specifically refer to Sec. 1981 in its opinion. The rationale behind the Court's decision, however, would appear equally applicable to actions under Sec. 1981 because the statute, like Sec. 1983, was intended to provide statutory protection to constitutional rights and while originating in the Civil Rights Act of 1866, was reenacted with Sec. 1983 as part of the Civil Rights Act of 1874.

The majority of the Circuit and District Courts[6] have read the *Washington v. Davis* intent rule as encompassing both Secs. 1981 and 1983 claims, construing both of the statutes to be governed by constitutional principles. In light of the legislative history of these two statutes and the thrust of this Court's decision in *Washington,* the correct view appears to be that expressed after remand by the Tenth Circuit in *Chicano Police Officer's Association v. Stover,* 552 F.2d 918 (1977), echoed by numerous federal courts:

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[6]*Chicago Police Officers Assn. v. Stover,* 552 F.2d 918 (10th Cir., 1977); *Arnold v. Ballard,* 12 EPD ¶ 11, 224 (1976); *United States v. City of Chicago,* 549 F.2d 415 (7th Cir., 1977); *City of Milwaukee v. Saxbe,* 546 F.2d 693, 705 (7th Cir. 1976); *Johnson v. Alexander,* ..... F.2d ..... 16 FEP Cases 894 (8th Cir. 1978); *Harkless v. Sweeny Independent School District,* ..... F.2d ....., 14 EPD ¶ 7669, 5295 (5th Cir. 1977); *Arnold v. Ballard,* (C73-478, USDC N.D. Ohio), Memorandum Opinion and Order dated Mar. 14, 1978; *Lewis v. Bethlehem Steel Corp.,* 440 F.Supp. 949, 963 (1977); *United States v. State of So. Carolina,* ..... F.Supp. ....., 15 FEP Cases 1196 (1977), (3-judge panel that included two circuit judges); *Crocker v. Boeing Co.,* 437 F.Supp. 1138 (1977); *Dickerson v. U. S. Steel Corp.,* ..... F.Supp. ....., 15 FEP Cases 753 (1977); *Veizaga v. National Board of Respiratory Therapy,* 13 EPD ¶ 11, 525, 8875, 8881 (N.D. Ill., January 27, 1977).

> "[T]he error in our holding and the views expressed by us is clear. We stated that we agreed . . . with the view that the measure of a claim under the Civil Rights Act is in essence that applied to a suit under Title VII of the Civil Rights Act of 1964. 526 F.2d at 438, 11 FEP Cases at 1061. This was contrary to the principle holding that came in *Washington v. Davis, supra,* at 238, 12 FEP Cases at 1418. All of our reasoning and treatment of the case which proceeded from the erroneous standard must be corrected."
>
> *Supra* at 920.

We believe that Judge Wallace of the 9th Circuit in his dissenting opinion in the case at bar correctly stated the law when he said,

> "Because Sec. 1981 is peculiarly linked to the Fourteenth Amendment, the standards pertaining to that Amendment should also control Sec. 1981 . . . . [S]ection 1981 enjoys a unique historical and conceptual relationship to the Fourteenth Amendment which is not shared by Title VII. Consequently, it is quite proper to assume absent a contrary holding by the Supreme Court, that the standards for establishing a *prima facie* case of discrimination under Sec. 1981 and the Equal Protection Clause of the Fourteenth Amendment should be the same: There must be proof of discriminatory intent."
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> *Davis v. County of Los Angeles,* 566 F.2d 1334 at 1348, 1349, (A. 111).

The *Washington* rule has been held applicable to Sec. 1983 causes of action,[7] a fact recognized by

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[7]*Washington v. Davis, supra; Chicano Police Officer's Ass'n. v. Stover,* 552 F.2d 918; *Lewis v. Bethlehem Steel,* 440 F. Supp. 949, 963-64.

respondents (Opp. 8). Yet, there is no real basis to distinguish Secs. 1981 and 1983 in regard to the standards of liability governing employment discrimination as both are equal protection statutes (Sec. 1981 is expressly so denominated in the statute heading in 42 U.S.C.) and derived from the Constitution. The intent of Congress during the period 1866-74 as to the nature of the discrimination each prohibited could not have been different.

Any detailed analysis as to which statutes this Court was referring to in *Washington* serves no meaningful purpose, although it appears that the statutes were 5 U.S.C. Sec. 3304 and 5 C.F.R. Sec. 300.101 relating to the District of Columbia's civil service procedures, which, during the litigation, the District asserted included the *Griggs* job-relatedness standards. Casting the question in the context of a "statute" or the Constitution is not conclusive.

Sec. 1981 as well as Sec. 1983 are clearly statutes, but the issue is what standards of liability did Congress intend to be applicable when they were enacted over ninety years ago. This Court, while noting in *Washington, supra* at 2051, that under Title VII Congress prescribed the job relatedness rule, expressly declined to expand its ambit to include the Constitution or any other statute except, perhaps, the District of Columbia codes as allowed by the defendants in *Washington*. To the contrary, the Court concluded that the "extensions of the job-relatedness rule beyond areas where it is already applicable by statute, such as the field of *public employment* (referring, Petitioners believe, to the District of Columbia code provisions because Sec. 1981 contains no limitation to public employment)

should await legislative prescription", *Washington v. Davis, supra* at 2051, 2052.

Finally, although too obvious to merit extended discussion, the circuit court's *Van Davis* decision effectively renders meaningless in great part the ruling in *Washington v. Davis*. Since there are a great variety of cases where Title VII does not apply, but Sec. 1981 and the 14th Amendment do, the intent requirement of the Amendment could be easily avoided by the simple expedient of pleading under Sec. 1981. If the standard for liability under Sec. 1981 was the same as that under Title VII, there was little reason for Congress to extend Title VII to public employers in 1972.

B. The Decision Fails to Properly Distinguish Between Pre- and Post-Title VII Hiring Practices Contrary to International Brotherhood of Teamsters v. United States.

The circuit court's ruling herein acts to make Title VII retroactive as to public agencies and to destroy any distinction between pre- and post-Act hiring practices. This conclusion is symptomatic of the lower federal courts erroneously ignoring, since *Griggs*, the distinction between the Civil Rights Act of 1866 and 1870 and the Civil Rights Act of 1964. Since most discrimination suits are filed under several statutes, the tendency has been to blur the statutory distinctions which, in many cases involving private employers, may have been of no moment since Title VII also applied fully.

It is instructive to note that the lower court Sec. 1981 cases which borrowed the lesser standard of liability from Title VII were decided in the year immediately following the *Griggs* decision, at a period when

Title VII already had been applicable to private employers for at least seven years. In retrospect, it can be seen, beginning with *Chance v. Board of Examiners, supra,* that in the field of public employment the lower courts have failed to maintain the sharp focus distinguishing Secs. 1981/1983 and later the enacted Title VII—although the Circuit Courts in *Chance, Castro v. Beecher,* 459 F.2d 725 (1st Cir. 1972) and *Bridgeport Guardians v. Bridgeport Civil Service Commission,* 482 F.2d 1333 (2nd Cir. 1973), treated Secs. 1981 and 1983 together as constitutional equal protection statutes.

The error in this interpretational leap can be made evident by considering its effect in the context of a private employer. If the *Griggs* decision had been decided in 1966 instead of 1971, then the circuit court's conclusion in the instant case that in terms of liability there is no operational distinction between Title VII and Sec. 1981, would have necessarily made Title VII standards through the mode of Sec. 1981 applicable to private employers prior to its effective date of July, 1965. The fact is, however, that the lower court decisions like the *Davis* case herein, were not decided until long after any applicable statute of limitations had run on a Sec. 1981 claim against a private employer. As the instant case vividly illustrates, the circumstance is the opposite with public employers. By the theory that the *Griggs* standard is now applicable to Sec. 1981 claims, the effective date of Title VII as to public employers has been in practical terms, advanced from three to six years preceding March 24, 1972, depending on the particular jurisdiction's statute of limitations. This is the practical effect despite the

continual admonition by the federal courts that Title VII is not retroactive.[8]

The circuit court opinion in the case at bar ignores the distinction recognized by this Court in *Hazelwood School District v. United States,* .... U.S. ...., 97 S.Ct. 2736 (1977), and *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 97 S.Ct. 1843 (1977), between liability predicated upon pre- and post-Title VII hiring practices. In *Hazelwood,* the Supreme Court reversed the decision of the circuit court because:

> "[T]he Court of Appeals totally disregarded the possibility that this *prima facie* statistical proof in the record might at the trial court level be rebutted by statistics dealing with *Hazelwood's* hiring after it became subject to Title VII. Racial discrimination by public employers was not made illegal under Title VII until March 24, 1972. A public employer who from that date forward made all its employment decisions in a wholly nondiscriminatory way would not violate Title VII even if it had formerly maintained an all-white work force by purposefully excluding Negroes."
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> *Hazelwood School District v. United States,* .... U.S. ...., 97 S.Ct. 2736 at 2742.

The Court further noted in footnote 15 of the Opinion that a public employer even before the extension of Title VII in 1972 was subject to the command

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[8]*Hazelwood School District v. United States,* ..... U.S. ....., 97 S.Ct. 2736 (1977); *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 97 S.Ct. 1843 (1977); *Patterson v. American Tobacco Co.,* 535 F.2d 251, (4th Cir. 1976); *Robinson v. Lorillard,* 444 F.2d 791 (4th Cir. 1971).

of the 14th Amendment not to engage in *purposeful* discrimination, the indication being that constitutional standards governed liability for pre-Title VII hiring practices.

In *International Brotherhood of Teamsters v. United States, supra,* the Court again admonished that the employer was governed by different standards of proof depending on when Title VII became applicable and must be afforded the opportunity to show,

> ". . . that the claimed discriminatory pattern is a product of pre-Act hiring rather than unlawful post-Act discrimination, or that during the period it is alleged to have pursued a discriminatory policy it made too few employment decisions to justify the inference that it had engaged in a regular practice of discrimination."
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> *International Brotherhood of Teamsters v. United States, supra* at 1867.

The Court's recognition of a distinction in treatment as well as effect of pre- and post-Title VII hiring practices is meaningful only if the standards of liability are different. If an employer could be held liable under Sec. 1981 for practices that antedated Title VII merely because they had a disproportionate impact and had not been shown statistically to be predictive of job performance, little would be gained by permitting an employer in a Title VII action to distinguish those employment practices occurring before the Act was effective.

III

THE CIRCUIT COURT'S RULING FRUSTRATES THE COMPREHENSIVE CONGRESSIONAL SCHEME EMBODIED IN TITLE VII.

A decision that there is no operational distinction between Sec. 1981 and Title VII in regard to standards of liability will result in serious unsettling and counter-productive effects on Title VII's comprehensive approach to the enforcement of equal employment rights.

Congress, while enacting Title VII in 1964 and again before extending it to public entities by the 1972 amendments, engaged in considerable debate concerning the terms of the Act. Consideration was given as to what employers should be excluded from coverage of the Act and what procedural safeguards should be provided in the administrative enforcement proceedings. Detailed provisions governing the exhaustion of administrative remedies (Sec. 706(b)(c)(d) and (e)), conciliation efforts (Sec. 706(b)), record-keeping and access (Sec. 709), and prerequisites to litigation (Sec. 706(f)(1)), were debated and ultimately enacted. Title VII as finally enacted incorporated the concerns of interested parties and Congress as to safeguarding and accommodating the rights of the employer and the individual. However, it is precisely these rights, representing the collective will of Congress, hammered out after long debate, and having become defined and settled after years of experience, utilization and judicial interpretation that are threatened by the circuit court's decision in this case.

Aside from the standard of liability, the major distinction between Title VII and the older Civil Rights Acts is in the area of coverage and administrative enforcement procedures. All of the forms of remedies

available under Title VII are likewise available under Sec. 1981[9] including attorneys' fees since the enactment of the Civil Rights Attorneys Fees Awards Act of 1976 (PL 94-559, 90 Stat 2641), amending 42 U.S.C. Sec. 1988. Extending the *Griggs* doctrine to Sec. 1981 suits reduces the difference between the two statutes to primarily the administrative enforcement procedures and this, when coupled with the more generous remedies under Sec. 1981, must inevitably act to frustrate the comprehensive administrative structure that Congress wished implemented with the passage of Title VII. The primary areas of the congressional plan adversely affected are: 1) Jurisdictional filing prerequisites, 2) employers included; 3) limitations on remedies, 4) conciliation and administrative review procedures, 5) uniformity of enforcement procedures, and 6) retroactivity.

A. Jurisdiction Filing Prerequisites Evaded.

Under Title VII, a discrimination charge with the EEOC must be filed within 180 days after alleged unlawful employment practice occurred. Section 706, (e), 42 U.S.C. Sec. 2000e-5(e) as amended, 1972. Thereafter, a civil complaint must be filed in federal court within ninety days of receipt of the notice of the right to sue. 42 U.S.C. Sec. 2000e-5(f)(1). The Supreme Court has held that these prerequisites to a fed-

[9]In fact, in many instances the Sec. 1981 remedy is more expansive, and punitive damages are available under Sec. 1981 but not Title VII (*Johnson v. Railway Express Agency, Inc., supra* at 460). The similar remedies available under Sec. 1981 are back pay (*Sabala v. Western Gillette, Inc.*, 516 F.2d 1251 (1975)), declaratory relief, including reinstatement, promotions and quotas for the class (*Sabol v. Snyder*, 524 F.2d 100a (10th Cir. 1975), Schei & Grossman, *Employment Discrimination Law*, p. 639).

eral civil action are jurisdictional. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

The Court noted in *United Air Lines v. Evans*, 431 U.S. 553, 97 S.Ct. 1885, 1889 (1977), that a claim based on a discriminatory act that was not made the basis for a timely EEOC charge was barred and merely constituted an unfortunate past event that had no present legal consequences. However, the failure to comply with any of important Title VII jurisdictional prerequisites will be of little consequence if the plaintiff can take advantage of Title VII's *Griggs* doctrine merely by filing a complaint under Sec. 1981, which is governed only by a less restrictive and non-uniform statute of limitations. Observance of Title VII's administrative requirements is of no significance as the filing of a Title VII charge and resort to the administrative machinery are not prerequisites for institution of a Sec. 1981 action. *Johnson v. Railway Express Agency, Inc., supra* at 460, 95 S.Ct. 1716, 1720 (1975).

B. Liability Standards Extended to Employers Congress Desired Excluded.

Transposing Title VII standards to Sec. 1981 actions would, contrary to the clear legislative intent, effectively bring certain agencies and individuals within Title VII's more restrictive embrace. Congress, when it originally enacted Title VII in 1964, expressly made the Act inapplicable to certain employers, most notably federal, state and local public entities. 42 U.S.C. Sec. 2000e(b)(c), eff. July 2, 1965.[10] As the instant case so

[10]Until March 24, 1972, 42 U.S.C. § 2000e(b) read "but such item does not include the United States, . . . or a State or political subdivision of a State. . . ."

clearly demonstrates, if the Circuit Court's decision is upheld these pre-1972 exclusions will be eroded by judicial fiat.

While public agencies have now been brought within the ambit of Title VII by the 1972 amendments, there still remain several categories of employers that Congress intends to exclude from its coverage. Employers covered by the Act must be persons engaged in an industry affecting commerce who have fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year (Sec. 701(b) of Title VII)). *Bona fide* private membership clubs (Sec. 701(b)(2)), Indian tribes (Sec. 701(b)), and the United States Government (701(b)) are also excluded.

Perhaps, most noteworthy of the exemptions is the Armed Forces which the federal courts have consistently held not to be covered by Title VII as it is not an "employer" as defined by the Act. (*Johnson v. Alexander*, 572 F.2d 1219, 16 FEP 894 (8th Cir. 1978)). As the Armed Forces can be sued under Sec. 1981, it takes little imagination to perceive the effect on the military if the circuit court opinion herein becomes the settled law.

C. Remedies.

The effect of the circuit court's ruling is to encourage plaintiffs to seek relief under Sec. 1981 rather than Title VII, because of the more generous remedies obtainable under Sec. 1981 while still having the advantage of Title VII's liberal standards of proof. Unlike Title VII, actions under Sec. 1981 permit compensatory as well as punitive damages and there is no two-year limitation on back pay awards.

D. Conciliation and Administrative Review Procedures Frustrated.

The greatest damage flowing from the circuit court's decision is that done to the conciliation and administrative review procedures which Congress designed to encourage settlement of cases short of litigation and, thus, avoid the judicial overload bound to ensue as a product of increased enforcement activity. Indeed, conciliation plays such a central role in the scheme of Title VII that the EEOC is required by law to refrain from commencing a civil action until it has discharged its administrative duties. *Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355 (1977).

In rejecting a contention that the EEOC was required to conciliate only the precise charges made by the complainant, the district court in *EEOC v. Sherwood Medical Industries*, ... F.Supp. ....., 17 FEP Cases 444 (1978), remarked:

> "This contention, if accepted, would run contrary to congressional intent and could well have the effect of rendering the conciliation requirement of an empty formality. The mandate that conciliation be attempted is unique to Title VII and it clearly reflects a strong congressional desire for out-of-court settlement of Title VII violations. See *Culpepper v. Reynolds Metal Co.*, 421 F.2d 888, 2 FEP Cases 377 (5th Cir. 1970); *Oatis v. Crown Zellerbach*, 398 F.2d 496, 1 FEP Cases 328 LRRM 2782. The legislative history of the 1972 amendments confirms that Congress viewed judicial relief as a recourse of last resort, sought only after a settlement has been attempted and failed. Conciliation is clearly the heart of the Title VII administrative process."

To extend to civil rights claimants the major advantage of Title VII, the standards of discrimination and burdens of proof, to claims under Sec. 1981 without Title VII's concomitant limitations would run directly contrary to the Congressional intent to settle out of court as many discrimination claims as possible.[11]

The heavy emphasis in Title VII on conciliation efforts before litigation cannot be viewed lightly. The administrative procedures set forth in Title VII reflect the congressional intent to provide victims of discrimination with appropriate redress, while, at the same time, not imposing unreasonable burdens upon employers.

E. Uniformity of Enforcement Actions Endangered.

The confusion resulting from the circuit court holding is illustrated by a consideration of the differing statutes of limitation applicable to Sec. 1981 actions. This Court and the circuit courts have uniformly held that the statute of limitation for Sec. 1981 actions is the most analogous state statute of limitations. *Johnson v. Railway Express Agency, Inc., supra.* Thus, the time limit on such actions ranges from one year to six years depending on the jurisdiction in which the action is filed.[12] In some instances the statute

[11]In urging the adoption of amendments to Title VII in 1972, the Congressional Committee noted that during the first five years of the EEOC's existence it received more than 52,000 charges. During the first 7½ months of the 1971-72 fiscal year the Commission received 14,644 charges—*U.S. Cong. and Admin. News* '72, p. 2139.

[12]6-year Statute of Limitation, Penn., *Dickerson v. U.S. Steel Corp.*, ... F.Supp. ....., 15 FEP Cases 752 (1977). 1-year Statute of Limitation, Tenn., *Johnson v. Railway Express Agency, Inc., supra* at 463.

of limitations varies within the same state.[13] An additional lack of uniformity is created by the fact that provisions regarding tolling, revival and application are interpreted under state law. *Johnson v. Railway Express Agency, Inc., supra.*

Unlike the situation under Title VII, employers, many of whom have offices in several jurisdictions, would not be governed by uniform filing and limitation requirements under Sec. 1981; yet, if the circuit court's conclusion in the instant case is accepted, these employers would be subject to Title VII's more rigorous and demanding standards of proof. As this Court observed in *Occidental Life Insurance Co. v. EEOC,* 432 U.S. 355, ... (1977), in noting a distinction between Title VII and other actions, the "Title VII defendant is alerted to the possibility of an enforcement suit within ten days after a charge has been filed. This prompt notice serves, as Congress intended, to give him an opportunity to gather and preserve evidence in anticipation of a court action".

The need to provide procedural safeguards for the rights of employers was clearly emphasized by Congress when the 1972 Title VII amendments were being considered. The congressional committee, noting that employers could be subject to enormous mandatory penalties in the absence of a definite limitation and that due process required prompt notice of a charge, stated in the Committee Report, "to avoid the litigation of state charges and to preclude respondents from being subject to indefinite liabilities, it is clear that a precise

[13]In Colorado a 2-year (*Ray v. Safeway Stores, Inc.*, ... F.Supp. ..... (1976))), and a 6-year Statute of Limitation (*Jackson v. Continental Oil Co.*, ... F.Supp. ..... (1975)) have been held to apply.

statute of limitations is needed. . . . It seems patent that failure to require timely notice violates all concepts of due process. In view of the specific abuses regarding service of charges under Title VII, a specific requirement for service on the respondent within a specified time period (5-7 days) is a prerequisite to maintaining minimum standards of process". *U.S. Cong. & Adm. News* '72, p. 2175.

A holding that the measure of discrimination is operationally the same under Sec. 1981 and Title VII would, thus, in practice operate to deprive the defendant of essential procedural safeguards noted in *Occidental.*

F. The Decision Renders Title VII Retroactive as to Public Agencies.

The extension of Title VII liability standards to Sec. 1981 actions challenging public agency hiring practices that occurred before the effective date of Title VII undeniably renders Title VII retroactive, contrary to the decisions of this Court.

In *International Brotherhood of Teamsters v. United States, supra* at 1867, and *Hazelwood School District v. United States,* ..... U.S. ....., 97 S.Ct. 2736, 2742, the Supreme Court expressly noted the difference in treatment between pre- and post-Title VII hiring practices and stated that discrimination by public employers under Title VII was not made illegal until March 24, 1972. Earlier in *Franks v. Bowman Transportation Company,* 424 U.S. 747, 759 n.12, the Court in affirming the principle that the effect of the Act was prospective, not retrospective, quoted an interpretive memorandum from the *Congressional Record.* This memorandum states in pertinent part:

> "Title VII would have no effect on establishing seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been discriminating in the past and as a result has an all white working force when the Title VII comes into effect the employers' obligation would be to simply fill future vacancies on a non-discriminatory basis."
>
> *Franks v. Bowman Transportation Co.,* 424 U.S. 747, n.12 at 759.

The circuit courts have uniformly held that Title VII is not retroactive and provides neither liability nor a remedy for discriminatory acts occurring before its effective date. *Patterson v. American Tobacco Co.,* 535 F.2d 257 (4th Cir. 1976); *Robinson v. Lorillard,* 444 F.2d 791 (4th Cir. 1971); *Place v. Weinberger,* 497 F.2d 412 (6th Cir. 1974).

In view of the settled law, it makes little sense to attempt to distinguish the present case simply because liability was found under Sec. 1981 when that liability was predicated entirely upon a standard that evolved solely from an interpretation of Title VII (*Griggs v. Duke Power*).

Although this Court has recognized that Title VII and Sec. 1981 are separate and distinct statutes upon which a claimant can base a claim of racial discrimination, it is completely appropriate in determining the liability standard under Sec. 1981, to consider Congress's understanding of the scope of Sec. 1981 at the time they enacted Title VII. In view of the legislative history (see pp. 16-17, *infra*) of Title VII, the conclusion is inescapable that Congress intended that statute to create additional rights and remedies in the

field of employment discrimination not available under the then existing law—for otherwise the Act's procedural and jurisdictional limitations would have no meaning. In this limited but significant sense then, Sec. 1981 should be construed to further, not frustrate, the intent of Congress. If Congress had believed at the time it enacted Title VII that they were merely restating the liability standards under the venerable Sec. 1981 or were changing them, then it acted at cross-purposes to their desire to expand remedies when it imposed procedural limitations.

IV
NO TITLE VII VIOLATION PROVEN.

The first recruit class hired by the petitioners after the effective date of Title VII was composed of 50% blacks and Mexican-Americans. The individuals in this class took the 1972 written aptitude test of which 97% received passing scores, and advanced to the oral interview and subsequent phases of the examination process. The subsequent elements in the process did not have an adverse impact on minorities and the respondents in their first and second amended complaints alleged that the ultimate hires were nondiscriminatory (A. 5, 6). All subsequent hires, of course, were in accordance with the Court's judgment of July 20, 1973 requiring that 40% of all new hires annually be black and Mexican-American.

As the respondents have agreed, the quota hiring order was necessarily affirmed on the basis of hiring that occurred prior to the effective date of Title VII (Opposition p. 29). To assert that the petitioners "utilized" the 1972 test after Title VII's extension to public agencies is misleading in the context of the

facts and forms no legally cognizable basis for a finding that Title VII has been violated. Written tests have no impact until actually used as a basis for hiring or rejection of applicants. It is conceded that the 1972 written test was not used in any adverse sense toward minorities in accepting or rejecting them for employment. Ninety-seven percent of all applicants passed the test and all advanced to further, admittedly nondiscriminatory, stages in the selection process. Only in this way was the 1972 test actually used and is the only factual basis upon which a court can adjudicate whether Title VII has been violated. The petitioners' uneffectuated proposal in the face of an extremely serious shortfall in firemen to interview on a preliminary basis the top 544 applicants taking the 1972 written test does not constitute a violation of Title VII any more than it can support the quota hiring order which the respondents concede was predicated upon claimed earlier Sec. 1981 violations. The interviews when finally commenced were not limited to the top 544 candidates, and the uneffectuated proposal obviously played no role in the ethnic composition of the petitioners' fire department.

Not only has no effective discriminatory act occurred since March 24, 1972, the threshold conditions for asserting a Title VII violation were never reached. A violation of Title VII requires proof of a pattern and practice of discrimination. Isolated incidents, even with some discriminatory effect, are insufficient to establish liability under that statute. *Hazelwood School District v. United States,* ..... U.S. ..... (1977), 97 S.Ct. 2736. There is simply no evidence in the record to sustain any finding of a pattern and practice of discrimination by petitioners after Title VII became effective.

The respondents' minimum height standard cannot independently constitute a violation of Sec. 1981, Sec. 1983 or Title VII simply because there was no discriminatory intent behind its application and the hiring after the effective date of Title VII was accomplished pursuant to the Court's quota order. The respondents expressly declined before the district and circuit court to seek elimination of the height standard[14] and the hiring results since 1972 (55% blacks and Mexican-Americans) belie any adverse effect in operation of such a standard. Minimum height standards have been upheld as having a rational basis in non-Title VII cases (*Smith v. Troyan*, 520 F.2d 492 (6th Cir. 1975), cert. den. U.S. Supreme Court). Finally, the respondents lacked standing to challenge the height requirement as none of the named plaintiffs (whether applicants or incumbents) had suffered any injury in fact as a consequence of its application since each met the minimum standard.

An independent question exists as to whether a public agency can be found guilty of violating Title VII in the face of an express finding of no discriminatory intent. The congressional debates on Title VII and at the time of its extension to public employers clearly indicate that Congress did so under the authority and scope of the Fourteenth Amendment (see Legislative History, U.S. Cong. & Adm. News '72, p. 2154;

[14]The respondents stated the basis for their circuit court appeal thus, "The only modification of the Judgment sought on this appeal is an increase in the Mexican-American hiring ratio, such increase to be ordered if there is a reversal by this court of appeal of the district court's conclusion of law that the height standard is job-related and legal. Plaintiffs-appellants did not seek below and do not seek on this appeal, an order enjoining the use of 5'7" height standard". (Brief of Appellants, 9th Cir., p. 3, lines 21-27.)

H.R. Rep. No. 92-238, p. 19 (1971); S. Rep. No. 92-415, pp. 10-11 (1971)). The standards of liability for employment discrimination under Title VII as to public employers can be no greater than that prescribed by the Constitution. Two federal courts thus far have held that purposeful interest is a requirement for establishing a Title VII violation against state agencies or its political subdivisions.

Scott v. City of Anniston, (N.D. Ala. 1977), 430 F.Supp. 507;

Friend v. Leidinger, (D.C., E. D. Va. 1977), 17 EPD ¶ 8392, 5978.

The U.S. Supreme Court has twice declined to pass on the issue on the basis that it was not properly before the Court. See *Dothard v. Rawlinson*, ... U.S. ....., 97 S.Ct. 2920 at 2724 n.1, and *Hazelwood School District v. United States*, ... U.S. ....., 97 S.Ct. 2736 at 2731 n.1.

V

THE AFFIRMED QUOTA HIRING ORDER CLEARLY EXCEEDS THE COURT'S REMEDIAL AUTHORITY.

The district court's quota hiring order was illegal and exceeded its jurisdiction for the following reasons: 1) The absence of a finding of intentional discrimination; 2) the fact that the discriminatory acts, if any, causing the present work force/labor pool disparity that is the object of the Court's order took place prior to the effective date of Title VII and the applicable statute of limitations for Sec. 1981; 3) the lack of standing as found by the circuit court because the plaintiff class did not include past applicants who were affected by any past practices; and 4) the quota order is totally unrelated to any proven effects of discrimina-

tion and attempts to mandate ethnic balance in the work force contrary to Sec. 703(j) of Title VII.

None of the named plaintiffs not already employed by the fire department had been applicants for the 1969 or any other prior examination. The respondents' complaint specifically alleged that the suit was brought on behalf of a class composed of all persons who are either black or Mexican-American and who are *current* or *future* applicants for employment as Los Angeles County firemen (A. 3). The first and only examination for County firefighter they had taken was the 1972 examination which in application had no adverse effect. The plaintiffs that were current firemen on the force, had, of course, passed some previous exam and were thereafter employed. The circuit court correctly concluded the plaintiffs lacked standing to challenge defendants' prior use of a written qualification test in 1969.[15] In light of the clear facts and this Court's ruling in *East Texas Freight v. Rodriguez*, 431 U.S. 395 (1977), such a finding was inescapable.

It thus follows that if the district court had no jurisdiction to declare the use of the 1969 test illegal (even absent a deliberate intent requirement), the court had no jurisdiction to impose a quota hiring order that could only be for the purpose of providing a

[15]The Court's ruling on lack of standing would necessarily encompass any previous employment practice not applied to plaintiffs as they could perforce have suffered no injury if they had not been candidates. Footnote 6 (A. 83) to the circuit court's majority opinion indicates that this was their understanding.

remedy for the consequences of a test the plaintiffs had no standing to challenge.

Contrary to respondents' assertions in their Opposition to the Petition herein, merely being of the same race as the alleged discriminatees is not sufficient to confer standing in the absence of an individual claim of injury. Respondents' position is contrary to this Court's decision in *East Texas Freight v. Rodriguez* and if adopted, must necessarily destroy the established concepts of standing. In this regard, it is of particular significance that not only were there no past rejected applicants named as plaintiffs, the suit was expressly brought only on behalf of current and future applicants (A. 5, 6).

Assuming *arguendo* that deliberate intent to discriminate is not necessary for liability under Sec. 1981 and that somehow the plaintiffs have standing to obtain a quota order as a remedy for a test they have no standing to challenge, the quota order requiring the entire fire department to achieve racial balance with the County's general population exceeds the Court's remedial authority for the following reasons: 1) It attempts to remedy purported discrimination (not supported by any finding of a discriminatory act) that could only have occurred prior to the three-year statute of limitations cut-off period governing Sec. 1981 claims (January 11, 1970);[16] 2) The order is contrary to the holding in *United Air Lines v. Evans*, 431 U.S. 553 (1977) that time barred claims have no

[16]The petitioners, pursuant to the quota hiring order, have to date hired more blacks and Mexican-Americans (207) than the number of persons of all races (187) hired as a result of the 1969 written test.

present legal consequences. The order is clearly intended to remedy past discriminatory practices unconstrained by any time limitations. In fact, the plaintiffs admit that past applicants who are time barred from suing will benefit from the quota order when they reapply. (Opp. 32.) At page 29 in respondents' Opposition they state: "Plaintiffs agree that the remedial hiring order herein was based on a pattern and practice of discriminatory practices that were unlawful only under § 1981, not Title VII." In this context, any statute of limitations, whether under Sec. 1981 or Title VII, is rendered meaningless; 3) Contrary to the principle that quota orders are limited to the extent of the violation proven and issued only in extreme circumstances, the district court's sweeping order herein simply seeks to achieve racial balance between the work force and the general community. This is directly contrary to the intent of Congress as expressed in Sec. 703(j) of Title VII, as well as several pronouncements of this Court.

Recently, including the decision in *Regents of the University of California v. Bakke,* ..... U.S. ....., 17 FEP Cases 1000 (1978), the Supreme Court has expressed concern that the remedies for discrimination not exceed the effects of the established violation. In *Milliken v. Bradley,* 418 U.S. 717, the Supreme Court found the school desegregation order requiring the crossing of district boundaries was not proper because there was no predicate of a constitutional violation or the identification of any significant segregative effects resulting from unconstitutional conduct. The order was held impermissible because it was not commensurate with the constitutional violation

to be redressed. This principle was restated in *Hills v. Gautreaux,* 96 S.Ct. 1538 (1976).

Limitations on a trial court's remedial authority in race discrimination cases was again underscored in *Dayton Board of Education v. Brinkman,* 433 U.S. 406, 97 S.Ct. 2766 (1977), wherein the District Court after finding constitutional violations ordered district-wide racial student redistribution until each school was brought within 15% of the black/white population ratio of Dayton. The Supreme Court vacated and remanded on ground that the federal court had exceeded its remedial authority to tailor the remedy to the extent of the constitutional violation. The Court held that there was no justification for the disparity between the evidence of the effects of the constitutional violation and the sweeping redistribution order.

Although *Milliken, Hills,* and *Dayton* involved illegal school segregation, the principle that the remedy must not exceed the extent of the violation proven is equally applicable to employment discrimination cases, particularly when the effect of such a remedial order is to discriminate in a very real sense against other races not sharing any culpability for past discriminatory practices. The quota order in this case is very similar in scope to those found defective in *Milliken* and *Dayton.* Premised on the most tenuous of grounds and unsupported by any evidence, it assumes that perfect racial parity would have been achieved in the absence of discrimination—and therefore ordered quota hiring until the entire department achieved current racial parity.[17] As emphasized herein, this was under-

[17]The current composition of the entire department has evolved during at least a 30-year period. Indeed, unless one

(This footnote is continued on next page)

taken in complete disregard of standing considerations, the statute of limitations, and any correlation between the effects of the only act found illegal (the 1972 written test) and the quota order. This is particularly unfortunate because of the complete lack of any identifiable victims and the respondents' express allegation that they represented only present and future applicants.

Limitations on the scope of quota orders in employment discrimination cases should be consistent with those applicable to other remedies, such as reinstatement, back pay and retroactive seniority, all of which this Court has construed to be limited by the statute of limitations, the damage actually proven, or by the scope of the applicable statute under which the violation was found.[18] *Franks v. Bowman Transportation Company*, 424 U.S. 747 (1976). Indeed, the limitations on racial hiring quotas should be even more stringent because, unlike the other remedies such as back pay and retroactive seniority, they impact not so much upon the employer, but upon innocent individuals who did not share in the discriminatory practices or profit therefrom.

The majority in *Bakke* observed this inherent unfairness in remarking that while racial classifications have been designed as remedies for the vindication of constitutional entitlements, "the scope of the remedies was

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assumes that *all* of the 1760 firefighters on the force had been hired in the eight years immediately preceding the lawsuit, the quota order seeks to remedy unproven discrimination occurring even before the original enactment of the Title VII in 1964.

[18]In *Albemarle v. Moody*, 422 U.S. 421 at 423, the Supreme Court stated that there should be no drastic distinction between injunctive and back pay relief, a concept at odds with the quota order herein.

not permitted to exceed the extent of the violations . . ." and further that ". . . the remedial action usually remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit". *Regents of the University of California v. Bakke*, slip op. pp. 31, 38, *supra* at 1014-17. Again in *Furnco Construction Corp. v. Waters*, ... U.S. ..... (1978), the Court admonished that "[i]t is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race without regard to whether members of the applicants' race are already proportionately represented in the work force". (Emphasis in original).

The sweeping quota order in the instant case patently violates the above principles and furnishes independent grounds for reversal.

Conclusion.

The facts of the instant case reveal that it is the classic one to measure the liability distinctions between Title VII and Sec. 1981 and to harmonize Secs. 1981, 1982, 1983 and 1985(3) by recognizing a uniform standard of liability for non-Title VII employment discrimination claims. There were no claims of discriminatory hiring after Title VII became effective, no discriminatory intent in the use of any hiring practices, and no standing by plaintiffs to challenge the pre-1972 hiring practices. This case is the appropriate one for the Court to make its *Washington v. Davis* intent rule complete and consistent in application to similar equal protection and constitutionally derived statutes of the same era.

Both Congress and this Court have recognized the unique nature of Title VII resulting in its being construed differently than predecessor anti-discrimination statutes. It is only within the context of Title VII, a statute that was prior to 1972, expressly inapplicable to public agencies such as the Petitioner, that the *Griggs* doctrine has evolved. Incalculable harm will result if legislative history and judicial precedent are ignored and unique Title VII derived standards are transposed to independent Sec. 1981. These include as a minima its retroactive effect on public agencies, the thwarting of the congressional limitations forming an integral part of Title VII which will inevitably encourage a flood of litigation and, perhaps most significantly, the expansion of the *Griggs* doctrine beyond the employment context.

Liability was found upon a showing of potential but unrealized disproportionate impact of the 1972 test, the circuit court holding that the respondents lacked standing to challenge the 1969 test. The quota hiring order was, therefore, predicated solely upon the current racial composition of the Fire Department, without distinction between pre- and post-Title VII hiring and without proof of any illegal pre-Title VII practices.

The excessive quota order, in complete disregard of standing, the Statute of Limitations, and totally divorced from the effects of any proven violation is clearly beyond the district court's authority and, by itself, constitutes compelling grounds for reversal.

Judgment of the Ninth Circuit should be reversed with direction that the order of the district court be vacated and the Complaint dismissed.

Respectfully submitted,

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